No. 131.

Brief of Peck v Kittredge for Appl

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellant,

vs.

WILLIAM H. TOMPKINS, W. T. LaFOLLETTE and ALEXANDER KIRKPATRICK, Constituting the Board of Railroad Commissioners of the State of South Dakota, et al.

No. ~~200~~. 131

BRIEF AND ARGUMENT FOR APPELLANT.

GEORGE R. PECK,
A. B. KITTREDGE,
SOLICITORS FOR APPELLANT.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

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WILLIAM H. TOMPKINS, W. T. LaFOLLETTE and ALEXANDER KIRKPATRICK, Constituting the Board of Railroad Commissioners of the State of South Dakota, et al.

STATEMENT OF THE CASE.

This is a suit brought by the Chicago, Milwaukee and St. Paul Railway Company against the defendants, William H. Tompkins, W. T. La Follette and Alexander Kirkpatrick, constituting the Board of Railroad Commissioners of the State of South Dakota. The bill was filed August 27, 1897, and its object was to enjoin the defendants from putting into effect certain proposed reductions in the rates of complainant for carrying freight and passengers in the State of South Dakota. The bill alleged that the then existing rates charged by complainant in South Dakota were just and reasonable; that the

rates promulgated by the defendants were unjust and unreasonable; that they would not afford complainant adequate compensation for the service to be performed, and that the order of the commissioners if enforced would operate to take complainant's property without just compensation, without due process of law, and would deprive complainant of the equal protection of the laws. A temporary injunction was allowed upon the filing of the bill, and the defendants answered, traversing the allegations of the bill, insisting that the proposed rates were just and reasonable and alleging that complainant's existing rates were unjust and unreasonable. Upon these issues testimony was taken and the case submitted at the April term, 1898, of the Circuit Court of the United States for the District of South Dakota, and a decree entered July 20, 1898, dismissing the bill. Complainant appealed to this court.

The evidence is voluminous, as in such cases it must necessarily be. It consists largely of statistical information gathered from the books and records of the complainant company, and of the testimony of witnesses familiar with railway operation. These all appear in the record and will be alluded to in the course of the argument.

SPECIFICATION OF ERRORS.

The decree of the court below is erroneous in the following respects:

1. In finding, adjudging and decreeing that the value of complainant's property in the State of South Dakota is $10,000,000.

2. In finding, adjudging and decreeing that "the fair value of the proportion of the complainant's said property assignable to local traffic was, for the year ending June 30th, 1894, $2,200,000, and for the year ending June 30th, 1895, $2,600,000, and for the year ending June 30th, 1896, $2,100,000, and for the year ending June 30th, 1897, $1,900,000."

3. In finding, adjudging and decreeing that "the local earnings of the complainant's lines under existing tariffs on the same proportion of the total value of the road in South Dakota as the local earnings bear to the gross earnings from all sources in South Dakota were:

For the year 1894, 18.5 per cent.
For the year 1895, 12.7 per cent.
For the year 1896, 15.6 per cent.
For the year 1897, 16.3 per cent."

4. In finding, adjudging and decreeing that "applying the schedule of rates sought to be enjoined in this action to the local traffic during the years above mentioned, on the same method of calculation, the value of complainant's property assignable to local traffic would be for the years ending June 30th, 1894, $1,900,000; June 30th, 1895, $2,300,000; June 30th, 1896, $1,800,000; June 30th, 1897, $1,600,000."

5th. In finding, adjudging and decreeing that "these earnings for the fiscal year 1894 would equal 18 per cent. of the value thus ascertained, and for the year 1895 would equal 12.1 per cent., and for the year 1896 would equal 15.3 per cent., and the year 1897 would equal 16.2 per cent."

6. In finding, adjudging and decreeing that "owing to the small difference between the percentage earned under the complainant's schedule of rates and fares and the commissioners' schedule of rates and fares for the four years prior to the commencement of this suit, and owing further to the amount of the percentages which would have been earned during said four years under the commissioners' schedule, the court is unable to find beyond a reasonable doubt that the local earnings under said commissioners' schedule would not during the years aforesaid have earned the reasonable cost of earning said local earnings and some reward to the owner of the property over and above said cost of operation."

7. In finding, adjudging and decreeing that "the court is unable to find from the testimony what the actual cost of earning the local earnings for the fiscal years ending June 30th, 1894, 1895, 1896 and 1897 was."

8. In concluding, as a matter of law, and adjudging and decreeing that "the enforcement of the proposed schedule of reasonable maximum rates and fares will not deprive the complainant of its property without due process of law."

9. In concluding, as a matter of law, and adjudging and decreeing that "the enforcement of the proposed schedule of reasonable maximum rates and fares will not deprive the complainant of the equal protection of the laws."

10. In concluding, as a matter of law, and adjudging and decreeing that "the enforcement of the proposed schedule of reasonable maximum rates and fares will not operate to take the property of complainant for public use without just compensation."

11. In ordering, adjudging and decreeing that "the prayer of complainant in its bill of complaint be in all-things denied."

12. In ordering, adjudging and decreeing that "the complainant's bill of complaint be in all things dismissed."

13. In ordering, adjudging and decreeing that "this action be in all things absolutely dismissed."

14. The court erred in its judgment and decree and its decision herein, in that it failed to consider the amount actually and necessarily paid out by the complainant in operating expenses to earn the moneys received on account of local traffic.

BRIEF AND ARGUMENT.

The question submitted to the court below, though its determination involved the consideration of many facts and figures, was, and since the decision of this court in *Smyth* v. *Ames*, 169 U. S., 466, has been, essentially a simple one. It required no particular skill when the facts were known to draw the correct legal conclusion, for the principles governing this class of cases are well settled and understood. The power of a state to regulate the rates to be charged by common carriers on business within that state is not, and cannot be, questioned. But the power to regulate rates and the power to establish rates go only to the extent of establishing such rates as are just and reasonable to the public and to the carrier. In *Smyth* v. *Ames*, *supra*, Mr. Justice HARLAN, speaking for this court, summarized the principles involved, and laid down three propositions which he said "must be regarded as settled":

"**1. That a railroad corporation is a person within the meaning of the Fourteenth Amendment.** * * *

2. A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad, that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.

3. While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its prop-

erty, without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

The question, therefore, with which the court below had to deal was, whether the rates established by the Board of Railroad Commissioners of South Dakota would admit of the complainant earning such compensation as, under all the circumstances, would be just to it and to the public. The limit of legislative power is reasonableness. Rates are reasonable when they secure to the carrier a just compensation for services performed. This is all the public is entitled to demand, and this the state may secure by appropriate legislation. As to the legal aspects of the case, there is little room for discussion. We shall show that the court below failed to perceive the necessary legal effect of the facts established, and, therefore, its decision was palpably and plainly wrong.

The Opinion of the Court Below.

The opinion of the learned judge who heard the case is embraced in the record, and at the beginning of the discussion, we beg to call the attention of the court to it. It contains a statement of certain familiar principles which had been established by this court, and which were properly adopted by the learned judge. But the error which pervades the opinion is not so much in what it contains as in what it omits. It is a universal rule, that in considering the reasonableness of a rate the amount of gross money earned by the carrier is one element, and the amount expended by the carrier in

earning it, is another. Before the gross money can become net money, the operating expenses must be paid. Whatever is left, if anything, stands for gain or reward. All this has been frequently pointed out by this court, and, indeed, is so plain and elemental that it is invariably acted upon. Every good business man carefully adjusts his affairs so as to secure such a relation between earnings and expenses as to give him some reward for his labor and for his investment. And yet, the learned judge below, within a few months after the decision of this court in *Smyth* v. *Ames*, having before him the opinion of Mr. Justice HARLAN, which clearly pointed out the elements that must necessarily be considered, proceeded to make his computations upon gross earnings alone, and decided the case upon them without so much as alluding to operating expenses. The opinion speaks for itself; and we venture to say that no court, no lawyer and no business man can read it without being struck by the omission.

Certain cases similar to this were pending in the Circuit Court of the United States for the District of North Dakota when this case was decided. The hearing in the *North Dakota* cases was before Judges THAYER and AMIDON, and we beg to quote from the opinion, filed December 23, 1898, written by Judge AMIDON, and concurred in by Judge THAYER:

"Counsel for defendants cites as directly in point a recent decision of the United States Circuit Court for the District of South Dakota, in the case of *Railway Co.* v. *Tompkins*, 90 Fed. Rep., 363, which involved substantially the same issues as the cases under consideration. There can be no criticism of the law as declared in the opinion in that case, but the learned judge seems to have proceeded upon a fundamental error of fact. In determining the rate of income which the company was earning upon the value of its property as fixed by the court,

no allowance whatever is made for operating expenses, but the entire gross receipts of the road are treated as net profits. This error greatly weakens if it does not destroy the authority of the opinion."

Railway Co. v. *Keyes et al.*, 91 Fed Rep., 47.

Undoubtedly weight should be given to the deliberate opinion of a court which has heard a case, and, being fully conversant with the facts, has applied the settled law to them. Under such circumstances, it may be fairly said that there is a presumption in favor of the correctness of the decision, but when the court, making up its own record of the reasons upon which the decision is based, informs all who read the opinion that it has overlooked and ignored the most essential fact in the case, the presumption is not in favor of but against the correctness of the decision. The question of operating expenses is, as Judge Amidon well said, a fundamental one. It is simply an impossibility to reach an intelligent conclusion in a case of this kind without considering them.

The vital question in the case is one of reward—whether the rates established by the Board of Commissioners will give to complainant such reward as under the constitution of the United States it is entitled to have for the service it performs. But how can the question of reward be determined until it is known by subtracting the expenses from the receipts, how much is left? It is, therefore, indispensable that not only the gross earnings, but the operating expenses, be considered in determining the adequacy of the reward.

If the method adopted by the court below was the correct one, it follows that this court wasted much valuable time in *Smyth* v. *Ames* in its elaborate discus-

sion of operating expenses and the relation between local expenses and expenses on through business. The court below in the present case made figures to show that complainant earned large percentages upon the capital invested in local business, but took no notice whatever of the money expended in earning such percentages. As Judge Amidon observed, with the concurrence of Judge Thayer, *supra:* "The entire gross receipts of the road are treated as net profits." This case is, therefore, to be heard here with little if any aid from the investigation made by the court below. A case is practically as if it had not been heard, when the court has overlooked or forgottten the main fact necessary to be found. Operating expenses may be large or they may be small, but it is perfectly certain that whatever they are they must be deducted from gross earnings before any idea can be formed as to the results of the business. The court found a certain value for the property in South Dakota, namely, ten millions of dollars. It assigned a certain proportionate share of it to local business; it ascertained the gross earnings on the local business, and treated that sum as the net result from local operations within the state. It figured out the percentage of these gross earnings to the value of the property, and also figured out the reduction in earnings which would result if the commissioners' rates were put in force, and then dismissed the consideration of the issues with the remark:

"It certainly would be impossible for this court to find *beyond a reasonable doubt* that these per cents allowed to be earned by the railroad company for local earnings would be depriving it of its property without due process of law or depriving it of the equal protection of the laws."

In this sentence the court reveals the erroneous

method by which its conclusions were reached: First, by treating gross earnings as net profits, and secondly, by holding that complainant must convince the court in such a suit as this, "beyond a reasonable doubt." The doctrine of proof beyond a reasonable doubt is a most valuable safeguard of personal rights in criminal prosecutions, but it has no application in this case. Bills for injunctions must be supported by clear and convincing evidence, and if the injunction seeks to restrain the act of a public administrative body it must be shown that the act complained of is clearly repugnant to the rights of the party seeking the relief. This, however, is a comparatively unimportant error. The great error which overshadows all others and which enters into every computation and every conclusion of the court, is the omission of operating expenses from consideration. They were not only not included in the mathematical calculations upon which the decision is based, but they were not even incidentally referred to.

It is difficult to understand how a court could fall into so strange an error as to speak of the gross earnings as "these percents allowed to be earned by the railroad company for local earnings." The percentages the court was speaking of were simply the percentages of gross revenue received by the company from local business. They were not the sums "allowed to be earned;" for the sums allowed to be earned under any rate are only such as may be left after paying operating expenses. No court has ever before held that the reasonableness of a rate could be determined by the amount of gross earnings under it. The only reason for considering gross earnings at all is for the purpose of ascertaining the net earnings, for it is to the net earnings that the court must look in determining whether a rate is just or not.

The Case on Its Merits.

Following the rule laid down by this court in *Smyth* v. *Ames*, *supra*, the questions to be discussed are as follows:

First. The gross earnings from local business.

Second. The operating expenses on local business.

Third. The reductions proposed by the Commissioners.

Fourth. The fair value of the property.

I.

Upon the first question, the evidence is clear and without dispute. Complainant's evidence gave the amount of gross local earnings in South Dakota for the fiscal years ending June 30, 1894, 1895, 1896 and 1897. No attempt was made to show that these figures were erroneous; they were conceded to be correct by the defendants and were adopted by the court identically as given by complainant. They are as follows:

	Freight	Passengers.
Year ending June 30, 1894,	$137,459.88	$270,146.47
" " " " 1895,	121,442.00	209,200.85
" " " " 1896,	110,432.45	217,673.50
" " " " 1897,	102,289.23	208,716.19

(See Exhibit No. 8, page 25 of the record.)

II.

(a) The question of operating expenses follows, and must necessarily follow the question of gross local earnings. How much was the company required to expend in securing its gross local earnings? is the inquiry presented. In disposing of it, the court, as shown above, simply ignored it altogether. But if the court had seen fit to give operating expenses their due and proper place in the consideration of the case, it would have been found that there was no uncertainty or reasonable controversy in respect to them. Complainant submitted ample, satisfactory and uncontradicted testimony, by the precise method pointed out in *Smyth* v. *Ames*. It was, as the record shows, far more complete and conclusive than the testimony upon which this court based its decision in that case. It showed with absolute precision and certainty what the operating expenses of complainant's system were for four years prior to the filing of the bill, and then it showed by the testimony of expert witnesses the largely increased cost of conducting local business over that of conducting through business, and over system business.

The proof discloses that the complainant has always kept an accurate account of its earnings and operating expenses as a system. Its earnings are ascertained from reports made by its agents and conductors and by the agents of other roads with which it transacts a joint business. The conductors make trip reports of the business done and the agents report freight forwarded and to what points, freight received and from what points, and the amount received from the sale of tickets. These reports

are compared with each other, verified and tabulated, and from them the earnings from all sources are exactly determined. When the gross earnings have been so ascertained and tabulated, a railroad company knows how much money it has collected or received, but it does not know how much of it it has saved. In other words, it does not know what the net result of its operations has been.

It must, therefore, ascertain its operating expenses. It would be a curious ledger account in any kind of business which should show on one side the moneys received and show nothing on the opposite side as to the moneys laid out and expended. This, however, is precisely what the court below did in its computations.

The entire operating expenses of a railroad system can be as readily ascertained at the end of the year, or of a given period, as can its gross earnings. Throughout the discussion it will be necessary for the court to distinguish between the operation of the system as a whole and the operation of its local parts. The system is the unit, and the local parts mere subdivisions of it. The operating expenses of a system are ascertained from its pay-rolls, materials purchased and used, rents paid, settlements of personal injury cases, loss and damage to freight, stock killed, fire losses, insurance, taxes and many other outlays which are necessarily made in the conduct of the business. For each item of expense a voucher is made and entered on the books of the company. At the end of each month, year, or any certain period, the company knows exactly what earnings have been received and what expenses have been incurred and paid out in the operation of its system. It has only to subtract one from the other to know what the results of its operations have been.

The earnings and operating expenses of complainant's system for the four fiscal years preceding the filing of the bill appear in Exhibit 7, Rec. p. 18, and were as follows:

	1894	1895	1896	1897
Gross Earning,	$31,327,950 95	$27,335,369 19	$32,681,828 88	$30,486,767 99
Total Expenses,	20,114,332 65	17,043,753 09	19,676,808 04	18,577,539 08
Net Earnings,	$11,213,618 30	$10,291,616 10	$13,005,020 84	$11,909,228 91

Comparing the gross earnings and operating expenses in this exhibit, it will be found that the operating expenses for the system for the four years in question were as follows:

For the year ending June 30, 1894..... 64.21%
" " " " " " 1895..... 62.35%
" " " " " " 1896..... 60.21%
" " " " " " 1897..... 60.94%

(Record, pp. 16 to 23 inclusive.)

These figures show that for each dollar earned on the system, complainant expended

For the year ending June 30, 1894.....64.21 cents.
" " " " " " 1895 .....62.35 cents.
" " " " " " 1896.....60.21 cents.
" " " " " " 1897... ....60.94 cents.

Having ascertained the gross earnings and operating expenses of the entire system we have taken a step in the inquiry, which inquiry is not as to the results of operating the system, but the results of the local operation in the State of South Dakota. Knowing the total operating expenses upon the system, we are to ascertain as nearly as possible the local operating expenses in South Dakota. *No separate account of local operating expenses can be kept by any railroad company, for the reason that*

local businss and through business are often carried upon the same trains, in charge of the same employes, so that the expenses of the service and substantially every element of cost are blended and intermingled But notwithstanding this is so, experience has shown that local operating expenses are much higher than operating expenses on through business, and therefore higher than the operating expenses of a system. This appeared in *Smyth* v. *Ames*, and appears conclusively in this case.

Having ascertained the operating expenses of the system, before a comparison is made between them and the operating expenses local to South Dakota, it is but just that the court should know whether the system operating expenses have been fair and reasonble. If so, they can be used as a basis for estimating the local operating expenses. The proof shows beyond any question, that complainant's railroad has been honestly, judiciously and economically managed and operated.

Mr. Earling, its vice president, who has been connected with the management of its property for more than thirty years, testified as follows:

"I consider that the Chicago, Milwaukee and St. Paul Railway has been efficiently and thoroughly well managed, and in as economical a manner as it was possidle to manage the property and keep it in a safe and proper condition." (Rec., 224.)

Mr. Truesdale, vice president and general manager of the Rock Island and Pacific Railroad, testified:

"Q. I will ask you to state, Mr. Truesdale, whether, in your opinion, based upon your knowledge of the Chicago, Milwaukee and St. Paul Railway, and of the conduct of its operations, whether it has been capably, ecnomically and judiciously managed?

A. There is no question whatever in my mind that

such is the case, and I think that the opinion obtains generally among railroad people that it has been so managed." (Rec., 311.)

Upon the same subject, Mr. C. H. Chappell, vice president and general manager of the Chicago and Alton Railroad Company, who has been engaged in railway service for more than forty years, testified:

"Q. I will ask you then to state from your knowledge and acquaintance with the management of the Chicago, Milwaukee and St. Paul Railway, whether in your opinion it has been capably, judiciously and economically managed?

"A. In my opinion the Chicago, Milwaukee and St. Paul Railway is one of the best managed roads in the western country, or in the eastern country.

"Q. If the operating expenses for the year ending June 30, 1897, were 60.94 per cent. of the gross earnings, what would you say as to that being a fair showing of the expense of operating the system?

"A. I should consider it a very excellent showing; it is very difficult to manage any of the Western railways on 60 per cent. of the earnings.

"Q. Would the fact that the operating expenses of the Chicago, Milwaukee and St. Paul Railway were 60.94 per cent. of the gross earnings indicate that it has been a judiciously operated and conducted railroad? A. Yes, sir." (Rec., 338-339.)

Mr. J. T. Harahan, vice president of the Illinois Central Railroad, and engaged in railway service since 1861, testified:

"Q. Well, then, I will ask you to state whether in your opinion based upon your knowledge of the Chicago, Milwaukee and St. Paul Railway, and of the conduct of its operations, it has been judiciously, economically and capably managed?

"A. I believe it has been very ably managed I know a good many of the young men who are connected with it, who are bright, sharp, active young men; and being thrown in with them as much as I have, that is the impression I have formed of them." (Rec., 587.)

Mr. George B. Harris, vice president of the Chicago, Burlington and Quincy Railroad Company, testified:

"I should say that the St. Paul road has been well managed, and has been as economically managed as is possible, consistent with rendering good service and safe service, and substantial maintenance of the property." (Rec., 643.)

It thus conclusively appears that the complainant's railroad is and has been a well managed road, that the best results possible have been secured, and that the expenditures in operation were only such as were necessarily incurred. The defendants produced no evidence upon this subject, and the honesty, capability and economy of complainant's management was not questioned during the taking of the testimony, nor at the hearing in the court below. It may therefore be considered as fully established that the operating expenses of the system as shown by the books of the company for the four years preceding the filing of the bill were not larger than was necessary to the safe and efficient management of the property.

Local Operating Expenses.

(b) That local operating expenses are more than upon the entire business of a system is common knowledge. This was recognized by Mr. Justice Harlan in his opinion in *Smyth* v. *Ames*, and it appears by the testimony of many witnesses in this case, who not only testified that such is the fact, but gave the reasons why it is so.

As above stated, it is not possible to keep a separate account of local operating expenses in South Dakota, or any other state, for the reason that local and inter-state traffic are frequently carried upon the same trains and in

charge of the same employes. But, for the purpose of this inquiry, they must be separated so far as is possible, and the increased cost of local operation ascertained to such an extent as will enable the court to determine the issue involved. At best the additional cost of local operation can only be an estimate. But courts act upon the opinions of expert witnesses and base their judgments thereon, when it is the best testimony that can be adduced. In *Smyth* v. *Ames*, *supra*, Mr. Justice HARLAN, commenting upon the testimony of Mr. Dilworth, said:

"He *estimated* that the percentage of operating expenses on local business would exceed the percentage on all business by at least ten per cent. and that it might go as high as twenty per cent or higher. And this view is more than sustained by the evidence of witnesses possessing special knowledge of railroad transportation, and of the cost of doing local business as compared with what is called through business. Indeed, one of those witnesses states that the cost of carrying local freight is four times as much as the cost of through freight per ton per mile; another that the cost of the short haul is reasonably double that of the long haul. If due regard be had to the testimony—and we have no other basis for our judgment—we are not permitted to place the extra cost of local business at less than ten per cent. greater than the percentage of cost of all the business." (Opinion, p. 529.)

But the court below was not satisfied to follow the method unanimously approved by this court. In the opinion which was filed July 6, 1898, local operating expenses were entirely ignored, and in the figures so industriously made by the court not one pertains to operating expenses, either locally or as a system; that is to say, the opinion below assumes that it does not cost anything to operate a railroad. Two weeks after the opinion was filed, the decree was entered, in which the court below finds that it "is unable to find from the testimony what

the *actual* cost of earning the local earnings for the fiscal years ending June 30, 1894, 1895, 1896 and 1897 was." This, we respectfully submit, only serves to make more plain the utter disregard by the court of the law as laid down in *Smyth* v. *Ames*. Of what avail is it for the court to say that it is unable to find "the actual cost of earning the local earnings"? It has never been claimed by anyone that the *actual* cost of local operation can be known, but it is well understood that the increased cost of local operation can be fairly *estimated* by competent expert witnesses.

Mr. Dilworth's testimony, upon which this court largely based its opinion in *Smyth* v. *Ames*, was only an estimate. In this case, as in that, complainant tendered the testimony of witnesses, in the language of Mr. Justice Harlan, "possessing special knowledge of railroad transportation, and of the cost of doing local business as compared with what is called through business." Again we suggest that testimony which is proper to be considered and acted upon by the Supreme Court of the United States is proper and fit for the consideration of the Circuit Court of the United States for South Dakota. If this court can act upon the opinions and estimates of competent and trustworthy witnesses, that court ought not to require more.

What would have been the fate of *Smyth* v. *Ames* if the actual local operating expenses must be ascertained in dollars and cents? If the court must know "the actual cost of earning the local earnings" neither *Smyth* v. *Ames* nor any case questioning the authority of a State Board of Railway Commissioners could ever be maintained, for in no case can the *actual* local operating expenses be ascertained. This is a

sufficient answer to the demand of the court below for actual knowledge. Unless the authority of a state legislature or Board of Railway Commissioners is above and beyond restraint, courts must have power to decide, according to the circumstances, as they appear from the best evidence obtainable. And estimates and opinions of witnesses possessing "special knowledge" are taken every day in courts of justice, and are acted upon without hesitation when they constitute, as they often do, the best evidence that can be produced upon the subject.

Complainant in this case followed step by step the line of testimony approved and acted upon in *Smyth* v. *Ames*, and the record shows how thoroughly the witnesses understood the subject, and how clearly and convincingly they testified in respect to it.

1. A. J. Earling, vice president of the Chicago, Milwaukee and St. Paul Railway Company, who stated that he had been in railway service since 1866—a period of more than thirty years, testified as follows:

"Q. Mr. Earling, are you acquainted with the relative transportation expenses of local traffic and through traffic?

A. Yes, sir; I have given that subject a great deal of study for many years.

Q. Please state in your own language the relative cost of conducting local and through traffic and the reasons which make them differ if they do.

A. I have found that it costs at least twice or three times as much to do the local business as it does to do the through business. Twice or three times as much in proportion to the earnings to do the local business as to do the through business." (Rec., 236.)

Mr. Earling then went on to show in the clearest possible manner *why* the conduct of local business is much more expensive than through business in proportion to

the revenue derived. He pointed out the difference between hauling light trains (which must necessarily produce small revenue), as compared with heavy trains, loaded to the capacity of the engines employed in through service, and which bring in a revenue to the company, to the extent of their earning capacity, from the time they start until they reach their destination.

His testimony is a demonstration of the proposition that the expense of conducting local business is very much in excess of the expense of conducting through business.

(See his testimony, p. 236 to 243 of the record.)

2. W. H. Truesdale, vice-president and general manager of the Chicago, Rock Island and Pacific Railway Company, from whose testimony it appears that he is an experienced railway man, entirely familiar with the subject upon which he testified, spoke of it as follows:

"There can be no question but the expenses of doing local business is much greater than that of handling through business. Just how much it is is a question. It is hard to say with any degree of accuracy. The opinions of railway people differ on that subject. I should say that a very conservative estimate of the difference in the expenses of doing a local, what you may term a strictly local business, as compared with through business, is somewhere in the neighborhood from two to three times as much for the former as the latter. There are many items of expense that enter into the handling of local business that do not in the through business. The chief difference I may say is in the trains and car loads. A through train can be loaded to the full capacity of the engine. It usually is—

Q. At the beginning?

A. At the beginning and through for its entire run. The local train, on the other hand—it may start with a train full, but that is rarely the case, and by the time it gets through its run, have practically nothing on the train,

and *vice versa;* it may start with nothing and at the end of its run have a full train. But, as a general rule, the local trains run lighter over their entire run than the through trains. And, if you get on an average of from one-third to one-half of the engine's capacity in the train, you are doing very well. Of course, in transacting the local business, the expenses of switching and the risks incident thereto are very much greater than on the through trains. The handling of freight and the labor incident to it is much more than in the through business—that is, about the local intermediate stations, the item of only partly loading your cars, a very large part of your cars, less than car loads, in some, and cars only partly loaded; they start from the beginning of the run with what is called a local way car. It may be full at the beginning, and by the time you get over the run, it is only half full, and at the end of the run there may be only one hundred pounds in the car, yet you have to haul it as though it was a full loaded car." (P. 312 and 313 record.).

On pages 327 and 328 of the record he testified as follows:

"Q. If 60 per cent. was a fair percentage for the operating expenses of a railway system situated as the St. Paul is, what, in your judgment, would be about the percentage of operating expenses to earnings of the lines in South Dakota, considering the difference between local business and the business of the system as a whole?

A. The item of expense would be relatively greater in South Dakota, as I explained this morning. Briefly, the expenses of transportation, the business being largely local, as against a great percentage of the business of the lines of the St. Paul road, being through business, and figuring that the transportation expenses average generally somewhere between 30 and 33⅓ per cent. of the total expense, I think, that is not very wide of the mark. I should think the percentage of gross earnings in South Dakota would be somewhere in the neighborhood of 85 or 90 per cent."

3. C. H. Chappell, vice-presiden and general manager of the Chicago and Alton Railroad Company,

from whose testimony it appeared that he had been in the railroad business from 1857, and had been general manager of the Chicago and Alton road since 1883, testified as follows:

"Q. In your judgment, Mr. Chappell, if you were called upon to express an opinion as to the relative cost of transportation upon local traffic and through traffic, what would be your opinion?

A. As to relative cost?

Q. Yes, sir.

A. I think the local traffic costs three or four times as much as the through traffic.

Q. Please explain fully, and in your own language, your reasons for expressing that opinion.

A. The first and the principal reason is the fact that, in local trains, they ordinarily carry a very small tonnage; the local trains are necessarily run with very few cars. They have a great deal of work to do at the different stations, and the wear and tear is very great for that reason, and the train men on local trains all receive larger pay per mile than on through trains.

Q. Does the fact that a through train is an earning train from the point at which it starts to its destination, while a local train is composed at the start of fewer cars, and the load which it is carrying is varible from station to station, enter into your estimate?

A. Certainly, that is one of the principal considerations." (Rec., 336 and 337.)

Upon cross-examination, Mr. Chappell, testified:

"Q. Take it upon the general traffic of the system, the earnings are one dollar as against sixty cents expense, how much expense would be required to earn one dollar in local freight traffic?

A. I should say ninety cents, somewhere in that vicinity." (Rec., 342.)

4. J. T. Harahan, second vice-president of the Illinois Central Railroad Company, who has had many years experience in railway service, testified as follows:

"Q. Which is more expensive in proportion to the

earnings, local business or through business? A. Of course the local business is more expensive to handle than the through business.

Q. How much more expensive is local business in a western state like South Dakota than through business?

A. Well, we have only got fourteen miles in South Dakota, but we have other lines running up to them in Iowa that are similarly situated as this part of the line I speak of between Sioux Falls and Sioux City, and we figure, out in that country, that it costs from two to three times as much to do local business as it does to do the through business.

Q. In proportion to the earnings?

A. Yes, sir; in proportion to the earnings." (Rec., 588.)

Further testifying he said (see pp. 590, 591 and 592):

"Q. You spoke of the lines of your company running to Sioux Falls, South Dakota?

A. Yes, sir.

Q. From what point on your system does that line diverge?

A. From Cherokee, Iowa. It runs from Cherokee, Iowa, to Sioux Falls, South Dakota, about ninety-five miles in length.

Q. Can you state what ratio the operating expenses bear on that line to the earnings?

A. Yes, sir; I have some figures made on that. That is a local line, you know.

Q. Do the figures you have include local and interstate business, or only the local business?

A. It includes everything.

Q. It is the gross business?

A. Yes, sir; it is the gross business.

Q. Will you state, by years, the proportion of operating expenses to earnings?

A. Well, for five years commencing with 1893 it cost—the average cost, commencing with 1893, and ending with 1897, both inclusive—it cost us $116.40 to earn $100, varying in 1893, $107.77; 1894, $122; 1895, $108.90; 1896, $103.30; 1897, $136.10, making, as I stated, an average cost of $116.40 for five years, to get $100.

Q. In other words, Mr. Harahan, the operating expenses were 116.40 per cent.?

A. Yes, sir: this don't include interest. This amount only included operation and taxes.

Q. Of that line, what portion is in South Dakota?

A. 14.95 miles in South Dakota.

Q. The condition on that line is somewhat similar to our line in South Dakota, is it not, as to the character of the traffic and general business?

A. They are similar to the line which I know personally running between Soux Falls and Sioux City; and I would say, so far as the operating expenses are concerned, both ought to be about the same, everything else being equal."

Mr. Harahan also testified as to the expense of conducting through business, citing the Chicago and Freeport line as an example, and testified that the average cost for conducting the business on that line for the five years from 1893 to 1897, inclusive, was only 53.28 per cent. (Rec., 593.)

5. George B. Harris, vice-president of the Chicago, Burlington and Quincy Railroad Company, a railroad man of many years' experience, testified (Rec., 642) as follows:

"Q. Mr. Harris, is there a difference in the expense of conducting local traffic as compared with through traffic, in proportion to the earnings from each?

A. I should say there was a very large difference.

Q. Which is the more expensive business to conduct?

A. The local business is very much the more expensive.

Q. What ratio in expenses would you say that local and through business bear to each other?

A. I should say that a very conservative estimate of the earnings and expenses would be at least three to one; that is to say, that the local traffic in that relation is three times as expensive."

By all this testimony complainant demonstrated that

the cost of carrying on local operations is very much greater than the cost of conducting through business. Just how much more *is necessarily a matter of opinion and estimate.* In this case, as in *Smyth* v. *Ames*, the witnesses varied in their opinions as to the relative cost of through and local business, but in this case, as in that, no witness failed to testify most positively that the cost of local business was very much larger than the cost of through business. The operating expenses of a system include both local and through business, and, of course, operating expenses locally must exceed, the operating expenses of the entire system.

The lowest estimate of any witness is from 85 to 90 per cent. (See testimony of Mr. Truesdale, Rec., 327, 328.) Mr. Chappell places it at 90 per cent. (Rec., 342.) From Mr. Earling's testimony (Rec., 234) it fairly appears that in the conduct of the South Dakota business, interstate as well as local, it costs all, if not more, than the company received. He points out fully the reasons for his opinion, and concludes with the significant language:

"In other words, if you will permit me to say so, I would not be willing to maintain and operate these lines for that sum of money. I should not care to take the contract to do it." (Rec., 234.)

Eighty-five per cent is a very low estimate for the local operating expenses, considering the system operating expenses to be 60 per cent., but, as a matter of fact, they were more than 60 per cent. In the four years covered by the testimony they varied from 60.21 to 64.21 per cent. on the system. We have, therefore, been more than fair to the defendants. We have taken less than the minimum per cent. as the cost of

operating the system, and have taken the lowest figure given by any of the witnesses, as the increased cost of local operation.

As we have before pointed out, the operating expenses of the system are ascertained each year with mathematical accuracy; but the court below, with the figures before it showing exactly what the operating expenses of the *system* were, found that it was impossible to ascertain *actually* the local operating expenses in South Dakota, and therefore *threw out operating expenses entirely.* One would suppose that the court might at least have allowed the expenses that were actually proved, namely, the operating expenses of the entire system as such,—being in no year less than sixty per cent. If anything was ever made plain it was made plain in this case that local operating expenses were very much higher than the operating expenses of the system for reasons which appear in *Smyth* v. *Ames*, and much more convincingly in this case.

The learned judge had before him full and complete testimony showing first, the actual operating expenses of the system and, secondly, demonstrating the increased cost of local operation, and yet in the opinion, which is a part of this record, he does not allude to operating expenses at all, and in his elaborate computation on which his decree was based, he deals only with gross earnings. It would be hard to believe that so palpable an error could be committed, if it were not disclosed by the unequivocal language of the opinion and by the computations which are contained in it and entered in the decree.

The court will not fail to notice a peculiar feature in the decree, which was entered two weeks after the opinion was filed. After ignoring operating expenses entirely

and filing an opinion in which it was made perfectly certain that the court did not consider operating expenses as an element in the case, it inserts a finding in the decree:

"That the court is unable to find from the testimony what the actual cost of earning the local earnings for the fiscal years ending June 30th, 1894, 1895, 1896 and 1897 was."

Of course it was impossible; and it always will be impossible for any court to ascertain the *actual* expense of local operation, but why insert such a finding in the decree, when the the court had filed an opinion which ignored operating expenses altogether and had constructed an elaborate table of percentages upon gross earnings alone?

"Conducting Transportation" as a Factor in Operating Expenses.

(c) The court had before it testimony fully explaining the relation which local operating expenses bear to the through operating expenses and the system operating expenses. Witnesses of intelligence and experience had explained fully why the one is greater than the other, and had made as their lowest estimate of local operating expenses 85 per cent. But aside from the positive declaration of witnesses an analysis of the testimony leads to the same conclusion. Operating expenses are made up of a great number of expenditures which must necessarily be made in carrying on the business of a railway corporation. They include maintenance of way, maintenance of equipment, taxes, general expenses and conducting transportation. The item "conducting transportation" is the only element of increased cost in local

operations of which we need now take notice. It is a technical term used by railway accountants and operators and includes avery large proportion of the operating expense, whether applied to local or through business. It consists of many items among which are wages of conductors, baggagemen, brakemen, engineers, firemen and wipers, fuel, oil and waste, train and station supplies, station service, personal injuries, damage to property, damage to freight, stock yards expenses, expenses of elevators, mileage of cars, sleeping car and parlor car expenses, trackage and switching charges, repairs of locomotives, repairs of cars tools and machinery, and other items which might be enumerated. (Testimony of Mr. Earling, Rec., 278.)

The item "conducting transportation" when applied to local opertations is largely increased, as is shown by the testimony we shall quote. The train and engine men receive somewhat higher pay; local trains are compelled to do switching en route; much more property is broken even under the most careful handling; there is more wear and tear on the equipment, on the rails, frogs, wheels and other portions of the property. The cars are injured more and the fuel bills are greater in local than in through traffic. In a word, every element going to make up cost of "conducting transportation" is increased in local business. All this was fully explained by the expert witnesses; and the court had only to read the testimony to fully understand the greater cost of local operation and the reasons why it is greater.

The Reason for the Increased Cost of Local Operation.

Complainant not only proved as a substantive fact that local business is conducted at an increased expense, but elaborately explained by competent witnesses the reasons upon which the fact rests. They pointed out in great detail the method of operating local trains and through trains. They showed wherein the one is more expensive than the other, and they made the whole subject so plain that it cannot be misunderstood. There is but one way of avoiding its effect, and that is by ignoring it altogether.

Mr. Earling testified:

"Q. The wages paid to engineers, firemen, conductors and brakemen are the same on a train which is loaded to its full capacity as upon a light train, is it not, practically? A. No, sir.

Q. In what respect do they differ? A. The wages paid to trainmen on through trains are somewhat less than are paid to the men who are on trains that do a local business.

Q. The time consumed in handling the business is another element entering into the expense, as a general thing, is it not? A. Yes, sir. It frequently occurs that a train which is required to do way work, switching, loading and unloading freight at the stations along its run is delayed so that it consumes more than ten and a half hours in making a run of 100 miles. In that case, overtime has to be paid, while in the case of a through train there is no occasion for such delay, for they have practically no work to do at stations, and they pass over the division and there is hardly any overtime because they do it easily in less than ten hours, but it often happens that what we call way trains are one or two hours more than the ten and a half hours making the 100 miles. The payment of the trainmen and enginemen is based on the miles that they make, or on a mileage basis.

Q. The amount of tonnage carried on any given

train is also an element to be considered in arriving at the cost of operation? A. It is the principal element.

Q. And what is the principal thing to be considered by a railway operator in conducting his traffic operations, in respect to the loading of his trains? A. The constant effort of all transportation men, and operating men, is to have full trains. By that I mean to have every locomotive loaded to its capacity, in going over the line, and to have as few light trains as possible. I would like to cite an instance in connection with our South Dakota line, just how it operates and why it costs so much more to do the business than it does on the lines where there is plenty of traffic, and enough freight to load the engines to their capacity. You are familiar, no doubt, with the branch line this company owns, extending from Andover, South Dakota, to Harlem, North Dakota, the same being a short distance in North Dakota, only a few miles. On that line at the present time we are operating a train three times a week, that is, it goes up and back the same day and does that three times a week. The traffic is so light that if that train was operated once in ten days it could do all the business of the line, but we have to run it three days in the week, and consequently the amount of freight and the number of passengers that we carry is very small; yet, the expense for wages, fuel and supplies are exactly the same. They are a great deal more than they should be, because we run three trains a week, instead of one in ten days. We could haul all the freight and carry all the passengers, if we ran the train once in ten days.

Q Have you any statistics showing the average number of tons of freight you carry on your South Dakota lines, or any of them? A. I have that information for a few of the divisions; I had it made up especially for this occasion. From Mitchell to Sioux City, a very small part of which line is in Iowa, only four or five miles, I think; the balance is in South Dakota. These statistics, which are carefully and correctly made, show that during the month of December, 1897, the average number of tons of freight per train for the month was ninety-six tons, while on the divisions where we have through business, I have taken the line from Chicago to

Milwaukee, the average there per train for the same month was 434 tons; on the line from Milwaukee to La Crosse it was 260 tons for the same month; and on the line from La Crosse to Minneapolis for the same month the average was 286 tons. Now, the line from Mitchell to Sioux City is rather better than the average of all the South Dakota lines in furnishing traffic. It is rather above the average. There are many South Dakota lines which would show a much smaller average than ninety-six tons.

Q. Well, have you the information as to any other divisions? A. No, I have not that information regarding other divisions.

Q. Not here, of course? A. No, sir.

Q. Have you got the division from Madison to Woonsocket? A. I think I have that. On the line between Madison and Woonsocket, which is all in South Dakota, the average per train for the month of December was seventy-two tons of freight.

Q. You have made up the figures on these divisions for the purpose of testifying here this morning? A. Yes, sir; we make up figures of this kind here and there in order to check the business of the various divisions, to see whether we have full trains or whether they are only partly filled, but I have not worked it up with reference to any other divisions except those I have named.

* * *

Q. Do the figures you have given by way of comparison on different divisions include all freight trains, whether technically classed as local or through trains? A. They include all freight trains that run over the divisions I have mentioned during the month of December.

Q. A through train is a train which is made up at a certain terminal and run right through to its destination without stopping for any intermediate business? A. Yes, sir; that is a through train.

Q. While a local train, whether it has some through business or not, is a train that stops either to take on or let off freight? A. That is correct.

Q. You have stated that it costs two or three times as much in proportion to the earnings derived from the

traffic to conduct local business than it does to conduct through business. Is that estimate fairly applicable to the business of the South Dakota line, as compared with the system as a system? A. It is a conservative statement, I should say. We have kept some statistics to show what it costs for the wages of engineers and firemen, the wages of conductors and brakemen, the cost of fuel, and the cost of supplies for locomotives and caboose cars; and those items only, nothing else entered into it, to haul 100 tons of freight one mile. These statistics show that on the line extending from Mitchell to Sioux City, it cost during the month of December, 1897, for those items which I have mentioned, 23.88 cents to haul 100 tons of freight one mile.

Q. That is simply for those particular things? A. For those particular items. While on the entire system during the same month the cost for those same items was 12 93 cents, nearly twice as much on the South Dakota line as it is on the system. I think I could further illustrate by assuming that I was engaged in the teaming business between two given points, and we will assume that the maximum load for a team and wagon was 3,000 pounds. Now, if I started out from one point with a few hundred pounds of goods and go along and pick up a few hundred pounds more, and so on, by the time I have reached my destination I then have a full load. I have hauled with that team the equivalent of one-half a load for the entire distance. Now, it has cost me just as much as if I had hauled a full load from the beginning to the end. Now if, as happens to be the case in South Dakota for nine months in the year, I only get goods enough so I have hauled but 25 per cent. of the 3,000 pounds, it is very plain that it increases the cost per hundred pounds or per pound as the load diminishes, or as it decreases below the maximum of 3,000 pounds. It is just exactly the same in the operation of trains, with the exception that it takes a little more fuel, and there is a little more wear and tear in hauling a full train than there would be to haul a lighter train, but that additional cost for the additional fuel and the additional wear and tear is so insignificant as compared to the difference in the earnings that it ought not to be taken into consideration.

Q. If a man with a team could haul 3,000 pounds at once, could have the whole 3,000 pounds loaded when he was ready to start, he could haul it in one trip, but suppose they got only 1,000 pounds to the team, he would have to make three trips? A. Yes, sir.

Q. That is similar to the situation where there is not freight sufficient to make a full train? A. Yes, sir; where you are compelled to run a train for the public. As I stated before, between Andover, South Dakota, and Harlem, a few miles in North Dakota, we run a train three times a week; while all the business could be done if you ran a train once in ten days." (Rec., 238, 239, 240, 241, 242 and 243.)

Mr. Truesdale testified as follows:

"Q. What, if any, difference is there between local and through trains as to the item of wages? A. Well, usually the men handling local freight trains are paid necessarily more than those running through trains; that is, for the same distance run.

Q. Is there any respect whatever in which the expenses of a through train exceed that of a local train except the item of fuel, and how much is that? How much more fuel does it take? A. It is a very small item." (Rec., 313.)

Mr. Chappell spoke upon the subject as follows:

"Q. Is there any respect in which the expenses of a through train are as great as the expenses of a local train, with respect to the item of fuel consumed, that you now think of, except in the item of fuel consumed? A. I think not.

Q. And how much difference is there in the amount of fuel consumed in a run of 100 miles by local train, considering the increased time it takes to run it and the stopping and switching, compared with the through trains which run through without stopping, except for water and coal; will one nearly balance the other? A. A local train can very easily burn more coal in a run of 100 miles than a through train.

Q Because of the switching and the times it stops, the coal in the locomotive burning all the time? A.

Yes; and switching is very hard on coal consumption; a great deal of that is done on local trains." (Rec., 337.)

Mr. Harahan testified as follows:

"Q. Mr. Harahan, I would like to have you give in detail a statement in respect to the expenses of conducting a through business and a local business. For instance, what, if any, difference is there in the wages paid to the trainmen? A. Local crews are paid more than through crews.

Q. Do you remember how much more? A. Well, it varies with the runs. Usually engineers getting say 4 cents on through freight runs would get about 4.5 cents on local runs.

Q. Per mile? A. Per mile run. The firemen we pay 50 per cent. of that amount. The conductors we pay $90 per month, and, in some instances, they will not average—when the work is heavy, they will not average eighty miles a day. We have three crews to run over that district. They go out one day, come back the next and lay over a day. So the cost is much greater on the local than on the through run. On the through runs we pay the conductors 3 cents and the brakemen 2 cents per mile, while the local men would probably average 4 cents for the conductor and about 2¼ or 2½ for the brakemen, per mile run.

Q. Take the expenses of switching? A. The expenses, of course, of switching at various stations where they have to stop to do work, set out cars or take on cars, of course is considerable, depending, of course, on how much they have to do.

Q. Well, is there any respect in which the expenses of through trains equal that of local trains? A. No, sir; not that I can imagine. Of course, if the local trains run over the road, and did not do any work at any point, then naturally, the expenses would be the same, but the practice is to stop and do work at the stations wherever it is to be done, which consumes time and coal and causes wear and tear.

Q. The expense of station service—how does that correspond? A. Well, of course, it is much greater for local business than through business, because it requires

a certain percentage of the time of the operator to receive orders for the trains. They have to see that the freight is properly loaded, billed, and take care of it." (Rec., 593, 4, 5.)

Mr. Harris, of the Chicago, Burlington and Quincy Railroad, testified:

"Q. You have stated that the expense of conducting local business is as much as three times as great as the expense of conducting through business in proportion to the earnings derived. Will you please state the reasons, or some of the reasons, for this opinion? A. Well, among the reasons for that, I should say, that in the first place, as a rule, all of the expert labor, the train and engine men, as a rule, receive higher pay in local than in through service. The local trains are compelled to start out almost invariably rather light so as to be able with reasonable promptness to do the switching and work at local stations. They are frequently compelled to take and move business along the line, and arrive at their destination with very small loads. The amount of switching upon a local train is such that much more property is broken up in the natural course of events even under the most careful handling. You will break up more or less property at stations. There is more wear and tear on the equipment, on the rails, and frogs, and wheels, and brasses: the cars are injured more in local traffic than in through service. The fuel bill, I think, as a rule is rather more on local runs than on the through runs, because it is necessary to throw the engine over when under pressure, and the changing of the engine, switching about, tears the fire to pieces and the fuel is destroyed or rather wasted in that way. We don't get the economical value of it in local service.

Q. Now in respect to casualties—personal injuries? A. My belief is that the casualties—injuries to persons are greater on local than on through trains. I should say there is no question about that. I think that the unavoidable injuries of that kind are greater in the movements about local stations, in proportion, than in the great terminal yard where we handle an enormous business.

Q. Then, in your opinion, the expense of handling and conducting local business is higher than that of conducting through business in practically every item of it, is it not? A. I believe that the necessary expense of conducting local business is greater in every item of expense than in a through business, and that it is possible to do only a portion of the business that is done by the through trains, and the revenue is therefore very much less. That is our experience." (Rec., 643, 644.)

Let us now apply this testimony, which bears upon its face convincing evidence of its trustworthiness, to the problem which the issues in the case required the court below to solve.

Mr. Truesdale (pages 327 and 328 of the record) testified that the tranportation expense, or "conducting transportation," was between 30 and 33 1-3 per cent. of the total operating expenses. Assuming that the total operating expense of the system is 60 per cent. of the earnings—we have shown it was more in the lowest year under consideration—30 per cent. of such 60 per cent. is the expense of "conducting transportation." 30 per cent. of 60 per cent. is 18 per cent. 18 per cent., therefore, of the system earnings was necessarily expended in the single item of "conducting transportation" during that year.

Now, it clearly appears that the increased cost of "conducting transportation" locally is at least two and a half times greater than the system expense of conducting transportation (Rec., 236, 312, 313, 336, 337, 588 and 642.) Two and one-half times 18 per cent. is 45 per cent. That is, on local business the expense of "conducting transportation" is 45 per cent. of the earnings. Assuming that the system operating expenses were only 60 per cent. of the earnings and that of this 60 per cent. 18 per cent.

was the cost of "conducting transportation," 42 per cent. remains to cover all the other operating expenses.

If the cost of conducting transportation on local business is two and one-half times as much as it is on the business of the system, it follows that the cost of "conducting transportation" on local business is 45 per cent., being two and one-half times 18 per cent. If it be assumed that the items of expense of local operation outside of "conducting transportation" are only as large as they are upon the system, although as a matter of fact they are considerably larger, we have 42 per cent. to cover them and 45 per cent. to cover "conducting transportation," making 87 per cent. as the total cost of local operation. It therefore appears that Mr. Truesdale's estimate of 85 per cent. is clearly a conservative one even for the lowest year of the four covered by the testimony. These computations are on the basis of 60 per cent. for the operating expenses of the system. The testimony shows they were not quite that low, and in 1894 they reached 64.21 per cent. Thirty per cent. of 64.21 per cent. is 19.26 per cent., which is the system expense of "conducting transportation" for that year. This increased two and a half times—the additional cost of conducting local transportation—is 48.15 per cent., which is the cost of conducting local transportation for that year. To this must be added 44.95 per cent., representing the remaining elements of the system operating expenses, and the result is 93.10 per cent. For the year 1894, therefore, it cost not less than $93.10 for every $100 earned from the local business. For the four years immediately preceding the filing of the bill the local operating expenses varied from 87.30 per cent to 93.10 per cent. of the earnings. Given by years they are as follows:

The year ending June 30, 1894, 93.10%
The year ending June 30, 1895, 90.40%
The year ending June 30, 1896, 87.30%
The year ending June 30, 1897, 88.36%

These percentages of local operating expenses to local gross earnings in South Dakota for the years named are not mere guesses; they were reached by the fairest and most conservative estimates of experienced witnesses, who give clear and convincing reasons for them. Undoubtedly they are lower than the actual outlays in conducting the local business.

The evidence shows that the business in South Dakota is exceptional. There are no through trains in that state except for brief periods, and then only from two points. This appears from the testimony of Mr. Earling, as follows:

"Q. Now, I will ask you to state, Mr. Earling, whether the freight trains conducting the business of this company in South Dakota are properly classed as local trains or through trains? A. They are all local trains. Occasionally, however, during the fall months, when there is some live stock moving from Chamberlain, which comes from across the river, and when grain is moving freely, we sometimes have a full train out of Eureka, and we have occasionally a full train of stock out of Chamberlain, but that happens only occasionally during the three fall months, say September, October and November.

Q. The freight trains in South Dakota, whether they are engaged in an exclusively local business, or are carrying what is known as interstate traffic, are all operated in the same manner that local trains are operated, and must be so for the reasons you have given? A. It must be so because there is not sufficient traffic to run through trains except in instances I have cited." (Rec., 241.)

Inasmuch as all the business in South Dakota, whether state or inter-state, is done upon local trains—except an

occasional through train mentioned in Mr. Earling's testimony (Rec., 241)—it follows that if we can ascertain by direct evidence any items of operating expense, we have, to that extent, ascertained the local operating expenses. Now, there are some items which, by careful examination of accounts, can be localized and fixed definitely upon a certain part of a system. This Mr. Earling did in a most careful and painstaking way, and the result showed that in reality the operating expenses in South Dakota were much larger than the estimates of any witness.

He testified (pages 219 to 308 of the record) concerning the cost of conducting business in South Dakota. The summary of his evidence appears in Exhibit 22, page 235 of the record, and the details thereof appear in Exhibit 23, page 300 of the record. This testimony is given from statements of the actual amounts expended, when actual amounts could be ascertained, and from experience and knowledge of the property and its requirements from year to year and from time to time. They do not include extraordinary expenses, such as the cost of removal of snow, or damages occasioned by heavy rains and in the repair of washouts. It was based upon thirty years' experience in the service of the complainant company. In every instance of doubt or uncertainty the defendants were given the benefit of it. Mr. Earling is corroborated in his testimony regarding each item of estimated expense by Mr. Truesdale (Rec., 308–333); Mr. Chappell (Rec., 333–349); Mr. Harrahan (Rec., 584–608), and Mr. Harris (Rec., 639–658), all of whom are connected with the leading railway systems of the west, and all familiar with the territory and the subject under consideration.

Concerning this exhibit Mr. Earling testified:

"Q. State whether this paper and the aggregate amount you have read fairly shows the cost of operation and maintenance of the lines in South Dakota for the period named (the year ending June 30, 1897)? A. Yes, sir, except in many instances I think it is rather below actual cost, for instance, personal injuries, the amount paid for personal injuries, damages to property and various other items are far below the average, and I regard it on the whole as a very conservative statement. In other words, if you will permit me to say so, I would not be willing to maintain and operate these lines for that sum of money. I should not care to take the contract to do it." (Rec., 234.)

We have thus shown by a large number of witnesses that local operating expenses are necessarily very much higher than through operating expenses or the operating expenses of any given system of railroad. We have shown that upon complainant's system they are not less than 85 per cent., and may be very much more. It requires but a simple mathematical operation to determine what would be left to complainant of its South Dakota earnings after paying the operating expenses, whatever percentage they may be.

As to the gross local earnings in South Dakota under existing rates, there is no dispute. They are, as we have already seen, as follows:

	Freight.	Passenger.
For the year ending June 30, 1894,	$137,459.88	$270,146.47
" " " " 1895,	121,442.00	209,200.85
" " " " 1896,	110,432.45	217,673.50
" " " " 1897,	102,280.23	208,716.19

(See Exhibit No. 8; Rec., 25.)

Adding together the freight and passenger earnings in the above table, we have as the gross earnings from both sources the following totals:

For the year ending June 30, 1894, $407,606.35
" " " 1895, 330,642.85
" " " 1896, 328,105.95
" " " 1897, 311,005.42

These are the gross local earnings to which the court below applied the commissioners' proposed schedule without any deduction for operating expenses. We will now show what they would have been if operating expenses had not been overlooked.

The court below said it could not find the actual cost of conducting the local business, but it is certain that the court could have found *that it cost as much as it did to do the business of the system as a whole.*

It it had done even that, the elaborate tables of gross earnings in South Dakota upon which its industrious computations were made, would have been radically different.

The table would have stood:

For the year ending	Gross local earnings.	Local operating expenses.	Local net earnings.
June 30, 1894	$407,606 35	64.21% or $261,724 04	$145,882 31
" " 1895.....	330,642 85	62.35% or $206,155 82	124,487 03
" " 1896..	328,105 95	60.21% or $197,552 59	130,553 36
" " 1897..	311,005 42	60.94% or $189,526 70	121,478 72

We have inserted this last table, in which the local operating expenses are assumed to be no more than the operating expenses of the system as a whole, to show at a glance the surprising disregard by the court below of the settled principles governing the case. We were not given credit by the court for even such operating ex-

penses as the proof showed had been incurred in conducting the business of the entire system. And yet the learned judge had before him the evidence, undisputed and overwhelming, that the local operating expenses were certainly as high as 85 per cent. and probably much more. There is no room under the testimony for questioning the conclusions of the experienced railroad men who testified on the subject. As we have before stated, the testimony is more complete and more convincing than in *Smyth* v. *Ames*, and the court below might well have heeded the language of Mr. Justice HARLAN who, in that case, declared that courts have no other basis for their judgments than the evidence before them.

Let us now see what the net earnings were for the four years as to which the testimony was taken, if, as is absolutely certain, the local operating expenses in South Dakota were not less than eighty-five per cent. of the gross earnings:

For the year ending	Gross local earnings.	Local operating expenses.	Local net earnings.
June 30, 1894	$407,606 35	85% or $346,465.40	$61,140 95
" " 1895.....	330,642 85	85% or $281,046.43	49,596 42
" " 1896..	328,105 95	85% or $278,890.07	49,215 88
" " 1897.....	311,005 42	85% or $264,354.62	46,650 80

The above table shows what the net earnings in South Dakota were for the four years in question, allowing 85 per cent. for local operating expenses; but as we have seen, the estimate of 85 per cent. for local operating expenses is based upon the ability of the company to operate the entire system for 60 per cent., which is

less than it has been able to do for any year of the four. Of course, if the operating expenses of the system were more than 60 per cent., the local expenses in South Dakota would be more than 85 per cent., even on the estimate of the most conservative witness. If the court will refer to the analysis of the different elements which make up operating expenses, as shown by the testimony of the different witnesses, it becomes plain they must have been much more than 85 per cent. All this is explained and illustrated in the testimony respecting the cost of "conducting transportation" as one of the largest elements of operating expenses. This testimony shows (see page 40 of this brief) that the local operating expenses in South Dakota instead of being 85 per cent., must have been, at least,

For the year ending June 30, 1894....93.10%
" " " " " " 1895....90.40%
" " " " " " 1896....87.30%
" " " " " " 1897....88.36%

These are undoubtedly the figures which most nearly approach the actual operating expenses in South Dakota. They show the following results for the years named, namely:

For the year ending	Gross local earnings.	Local operating expenses.	Local net earnings.
June 30, 1894.....	$407,606 35	93.10% or $ 379,481 52	$28,124 83
" " 1895.....	330,642 85	90.40% or $ 298,901 14	31,741 71
" " 1896.....	328,105 95	87.30% or $ 286,436 50	41,669 45
" " 1897.....	311,005 42	88.36% or $ 274,804 38	36,201 04

We have now reached a point in the discussion where the court can judge of the tangible results of operating complainant's South Dakota lines, prior to the action of the railway commissioners in promulgating their schedule of reduced rates. It seems hardly necessary to observe that the court below ought to have done what we have done in the above tables. Gross earnings are not profits; and railroad companies cannot use them in payment of fixed charges, dividends or for any other purpose, until operating expenses are paid and satisfied. How the court below could end its investigation with a consideration of gross earnings alone is as incomprehensible to us as it was to Judges Amidon and Thayer in the North Dakota case, *supra*.

Of course, gross earnings are to be considered; *but considered only as a step toward ascertaining net earnings*. A railroad company may have large gross earnings and still have little or nothing with which to pay fixed charges or any return to the owners upon their investment. That was the situation in the Reagan case. (*Reagan et al.* v. *Farmers' Loan & Trust Co.*, 154 U. S., 362).

How could the court below—how can any court—determine whether a railroad company is earning a just and reasonable reward for the service or upon its investment, until it has first learned how much money the company has succeeded in saving as a result of its operations? If a railroad could be operated without expense; if engineers and firemen and conductors and brakemen could be secured without the payment of wages; if equipment and fuel were free; and if the multitude of expenses attendant upon railway operations could be entirely eliminated so that the company could keep all that the public pays it

for services; if there were no fixed charges, and no expectation of reward on the part of the stockholders, the business would, indeed, be a pleasant one, and rates might be scaled down to zero without impairment of constitutional rights. The court below was unable to find "beyond a reasonable doubt" that reducing complainant's gross earnings would take its property without just compensation or without due process of law. But complainant's objection to the action of the railway commissioners is not that it would take from it some of its gross earnings, but that it would take all of its net earnings.

It does not seem to have occurred to the court below that a reduction of gross earnings amounting to any given per cent. necessarily works a much larger percentage of reduction in the net earnings, for reasons which are obvious, and which will presently be shown by actual figures.

We now proceed to consider the proposed reductions.

III.

PROPOSED SCHEDULE OF RATES.

The statute of South Dakota, under which the commissioners acted, authorized them to adopt a schedule of both freight and passenger rates, the former being left by the act to the untrammeled discretion of the board, and the latter fixed at not more than 3 cents per mile. On the 26th day of August, 1897, the commissioners promulgated their proposed schedule of rates, reducing the freight rates and

passenger fares that the complainant might lawfully receive. A great mass of testimony was taken relating to the extent of such reductions. It was established by the complainant, conceded by the defendants and found by the court, that the reduction in freight rates amounted to 17.44%
and in passenger fares..... 15.27%
That is, had the commissioners' proposed schedule of rates been effective during the four years prior to the filing of the bill, the complainant would have received $82.56 instead of $100 earned under existing freight rates, and $84.73. for every $100 now earned in its passenger business. The reduction in dollars under the proposed schedule of rates would be:

For the year

ending	Freight.	Passenger.	Total.
June 30, 1894....	$23,973.00	$41,251.37	$65,224.37
" " 1895....	21,179.48	31,944.97	53,124.45
" " 1896....	19,259.42	33,238.74	52,498.16
" " 1897....	17,839.25	31,870.96	49,710.21

Application of Proposed Reductions.

Knowing the reductions made by the Commissioners' schedule, both in percentage and in actual amounts, the next step is to apply them to the earnings as they stood under existing rates And here we suggest again that there is no dispute about the amounts and reductions, the proof being clear and the court having found them and entered them in its decree.

By tables to which we now ask the attention of the court, it will be seen at a glance what reduction of net earnings is made, whether the local operating expenses

are assumed to be the same as that of the entire system, or whether they are considered to be 85 per cent., or whether they are considered to be a still larger percentage, as undoubtedly the fact is. The net earnings must always be what is left of the gross earnings after operating expenses are deducted.

TABLE NO. 1.

If operating expenses are no greater locally than upon system—

	Year Ending June 30, 1894.	Year Ending June 30, 1895.	Year Ending June 30, 1896.	Year Ending June 30, 1897.
Gross local earnings—				
Freight	$137,459 88	$121,442 00	$110,432 45	$102,289 23
Passenger	270,146 47	209,200 85	217,673 50	208,716 19
Total	$407,606 35	$330,642 85	$328,105 95	$311,005 42
Local operating expenses, basis of entire system.	64.21% or $261,724 04	62.35% or $206,155 82	60.21% or $197,552 59	60.94% or $189,526 70
Net local earnings	$145,882 31	$124,487 03	$130,553 36	$121,478 72
Less reductions—				
Freight, 17.44%	$23,973 00	$21,179 48	$19,259 42	$17,839 25
Passenger, 15.27%	41,251 37	31,944 97	33,238 74	31,870 96
Total reductions	$65,224 37	$53,124 45	$52,498 16	$49,710 21
Net local earnings after reductions	$80,657 94	$71,362 58	$78,055 20	$71,768 70

TABLE No. 2.

If local operating expenses are eighty-five per cent. of earnings—

	Year ending June 30, 1894.	Year ending June 30, 1895.	Year ending June 30, 1896.	Year ending June 30, 1897.
Gross local earnings—				
Freight	$137,459 88	$121,442 00	$110,432 45	$102,589 23
Passenger	270,146 47	209,200 85	217,673 50	208,716 19
Total	$407,606 35	$330,642 85	$328,105 95	$311,005 42
Operating expenses	85% or $346,465 40	85% or $281,046 43	85% or $278,890 07	85% or $264,354 62
Net local earnings	$61,140 95	$49,596 42	$49,215 88	$46,650 80
Less reductions—				
Freight, 17.44%	$23,973 00	$21,170 48	$19,259 42	$17,839 25
Passenger, 15.27%	41,251 37	31,944 97	33,238 74	31,870 96
Total reductions	$65,224 37	$53,124 45	$52,498 16	$49,710 21
Loss	$4,083 42	$3,528 03	$3,282 28	$3,059 41

TABLE NO. 3.

If the local operating expenses are 93.10 per cent., 90.40 per cent., 87.30 per cent. and 88.36 per cent. of the earnings for the years 1894, 1895, 1896 and 1897, respectively:

	Year ending June 30, 1894.	Year ending June 30, 1895.	Year ending June 30, 1896.	Year ending June 30, 1897.
Gross local earnings—				
Freight	$137,459 88	$121,442 00	$110,432 45	$102,289 23
Passenger	270,146 47	209,200 85	217,673 50	208,716 19
Total	$407,606 35	$330,642 85	$328,105 95	$311,005 42
Operating expenses	93.10% or $379,481.52	90.40% or $298,901 14	87.30% or $286,436 50	88.36% or $274,804 38
Net local earnings	$28,124 83	$31,741 71	$41,669 45	$36,201 04
Less reductions—				
Freight 17.44%	$23,973 00	$21,179 48	$19,259 42	$17,839 25
Passenger 15.27%	41,251 37	31,944 97	33,238 74	31,870 96
Total reductions	$65,224 37	$53,124 45	$52,498 16	$49,710 21
Loss	$37,099 54	$21,382 74	$10,828 71	$13,509 17

If the actual expenses of operation in South Dakota for the four years ending June 30, 1897, were the sums appearing in Exhibit 31 (page 566 of record), it is evident by mathematical calculation that the local operating expenses for the year ending June 30, 1894, instead of being only 85 per cent., were 96.89 per cent.; for the year ending June 30, 1895, they reached the enormous expenditure, for operating expenses, of 143.06 per cent.; for the year ending June 30, 1896, 114.59 per cent., and for the year ending June 30, 1897, 111.14 per cent. That is, for the year ending June 30, 1894, 1895, 1896 and 1897, respectively, for every $100 of the amount actually received, the complainant expended in the cost of operation, the sums of,

$96.89 in 1894.
143.06 in 1895.
114.59 in 1896.
111.14 in 1897.

Taking these four years together, it cost the complainant in operating expenses in South Dakota an average of $114.17 for every $100 received.

Compare this testimony with that of Mr. Harahan (page 591), and it will be seen that it is in entire accord with the actual results of operating lines similarly situated, by other companies. He states that the average cost for five years, commencing with 1893, of that portion of the line of the Illinois Central Railway Company from Cherokee, Iowa, to Sioux Falls, South Dakota, including both state and interstate business, was $116.40 for every $100 earned.

The Effect Upon Net Earnings of a Reduction of Gross Earnings.

The court below dealt only with gross earnings. Neither operating expenses nor net earnings found any place in the computations by which it reached its conclusion. The learned judge found that the commissioners' proposed schedule would reduce complainant's gross freight earnings in South Dakota..... 17.44 per cent. and its gross passenger earnings..... 15.27 per cent. and in his view of the case complainant could not justly object to such a reduction. It is plain from the opinion and from the figures it contains that the court did not appreciate nor for a moment consider the fact that any percentage of reduction in gross earnings *operates as a much larger percentage of reduction in net earnings.*

Under table No. 1 the net earnings on both passengers and freight for the year ending June 30, 1894, were..... $145,882.31
Total reduction 65,224.37
which is 44.71 per cent. of the net earnings. This means that, even allowing that the cost of local operations is no greater than the cost of operations upon the entire system, the proposed reductions would have taken from complainant for the year ending June 30, 1894, 44.71 per cent. of its net earnings, or nearly one-half; and for each of the subsequent years 1895, 1896 and 1897 a corresponding percentage, varying as the operating expenses vary.

If, however, allowance be made for the increased cost of local operation, instead of assuming that it cost no more to operate locally in South Dakota than it

does to operate the entire system, the figures become still more striking. The subjoined table (No. 4) shows exactly what percentage of reduction is made in the net earnings by the commissioners' schedule, taking local operating expenses to be the different percentages given in the table:

TABLE NO. 4.

If operating expenses are of earnings—

	60%	65%	70%	80%	85%	90%
A reduction of freight earnings of 17.44% would reduce net earnings.....	43.60%	49.83%	58.13%	87.20%	116.27%	174.40%
A reduction of passenger earnings of 15.27% would reduce net earnings.....	38.17%	43.63%	50.90%	76.35%	101.80%	152.70%

This last table most strikingly exhibits the impropriety of generalizing on gross earnings when the effect upon net earnings is the question to be solved.

Nothing can be more certain under the testimony than that 85 per cent. is a low estimate of local operating expenses in South Dakota. And yet, table No. 4 shows that with local operating expenses at 85 per cent. of the gross earnings, the net earnings would be reduced by the commissioners' schedule—

On freight..... 116.27%

" passengers..... 101.80%

which simply means that the effect of the commissioners' rates would be to compel complainant to do business at a heavy actual loss. If complainant be required by the commissioners' schedule to do business at an actual loss, the value of the property used is only material for the purpose of determining how great an injustice is accomplished by the schedule.

IV.

THE VALUE OF COMPLAINANT'S PROPERTY IN SOUTH DAKOTA, AND THE REWARD WHICH ITS OWNERS SHOULD BE PERMITTED TO EARN.

In *Smyth* v. *Ames*, Mr. Justice HARLAN speaking for this court, said:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case."

In the state of South Dakota the complainant has 1,101.06 miles of main track (Rec., 7), and it acquired this property between the years of 1879 and 1887. About 200 miles of it was acquired by purchase, namely, the line from Sioux City to Yankton, from Elk Point to and through Sioux Falls to Egan, and east of Egan to the Minnesota state line. The remaining 900 miles were constructed by the company and within the period named.

The total original cost of constructing and equipping the properties of the company in South Dakota was the sum of $19,476.540.23, or $17,688.90 per mile. This appears from the testimony of Mr. Whittemore, chief engineer

of the company (Rec., 393 to 431); Mr. Collins, general superintendent at the time his testimony was taken, but now general manager (Rec., 431 to 453); Mr. Bates, superintendent of bridges and buildings (Rec., 453 to 525), Mr. Manchester, assistant general superintendent of motive power (Rec., 526 to 537), and Mr. Winne, general auditor (Rec., 556, and Exhibit 28, page 563).

In respect to the testimony of these witnesses, it need only be stated that they are all gentlemen of age and experience, and against whom not the slightest imputation of bias or prejudice can be made.

Exhibit 25 (Rec., 423) gives the original cost of complainant's properties in South Dakota, except the cost of equipment and the shop estimate, and was testified to by Mr. Whittemore, the chief engineer. Mr. Collins, the then general superintendent of the company, testified fully respecting the equipment required and used in the conduct of the business of complainant in South Dakota. (Rec., 434 and 435). Mr. Winne gave the cost of such equipment (Rec., 556), and it appears in detail at page 563. Mr. Bates, in his evidence, gave the original cost of construction of the buildings, and Mr. Manchester testified concerning the cost of shop facilities and the proportion thereof required in the operation of the South Dakota lines.

That a railroad (whether employed in state or interstate business) requires all these things, need not be argued. Everyone knows that it does, and that, without them, the business cannot be carried on.

Referring, for instance, to the testimony of Mr. Manchester. It is plain that local lines of railway in South Dakota must have shop facilities for the repair of

engines and rolling stock. If they are not, or cannot be, located in South Dakota, they must be located elsewhere, the important point being that the local lines of South Dakota receive the benefit of such facilities. It is not therefore to be disputed that the South Dakota lines should bear their fair and just proportion of the value of shops and other facilities, wherever located, which are used for their benefit in connection with the other parts of the system.

The original cost of construction and equipment, as we have already shown, was $19,476,540.23. The amount expended for permanent improvements is $756,294. (Rec., 424.

The amount of bonds on South Dakota lines exclusively, is evidenced by Exhibit 4, page 11 of the record, to wit: $19,365,247.16, or $17,587.82 per mile, being less than the original cost of construction. The interest which these bonds actually bear amounts to an average of 5.69 per cent. The total amount of interest which must be paid by the company on account of South Dakota lines amounts per annum to $1,101,749.93. This indebtedness attaches to them, and if it be a fair indebtedness—and there is no evidence whatever to the contrary—these lines should bear it and are entitled to establish such local rates as will earn the proportion of the interest which is properly chargeable to the local business.

The market value of the bonds and stock of the company appears in the testimony of Mr. Mayer (Rec., 623 to 638). The present, as compared with the original cost of construction, appears from the testimony of Mr. Whittemore, chief engineer (Rec., 425 and 426), namely, that the property in South Dakota—the property to which the commissioners' proposed schedule of rates applies—could

not now be reproduced or replaced for less than the amount originally invested in producing it.

In truth, a railroad cannot be reproduced. It is the growth of years. Every month and almost every day new and added improvements are made; new and additional investments are placed upon it. The result is a property of greatly added value and efficiency, not to be measured by the original cost, but to be considered as a product of all that has been expended and all that has been done to make it what it is.

With all this testimony before it the court below found the value of complainant's property in South Dnkota to be $10,000,000, about half the amount shown to have been invested in it. There was no testimony disputing the valuation of complainant's witnesses, except in a few items and comparatively insignificant amounts. Mr. Whitney, one of defendants' witnesses, criticised the testimony of Mr. Whittemore relative to the original cost of construction, in four particulars, namely: (1) cost of laying and surfacing tracks; (2) number of ties per mile and cost per tie; (3) freight on material used in construction; (4) interest on amount invested during period of construction. (Rec., 870.)

Mr. Whittemore testified (Rec., 402) that it cost $450 per mile to lay and surface the track; Mr. Whitney estimated such cost at $240 per mile. Mr. Whittemore testified that in each mile of track 3,000 ties were laid; Mr. Whitney estimated that 2,816 ties were used (Rec., 840), a difference of 184 ties per mile. He made his estimate by counting the ties at stations while the train upon which he was a passenger was stopping to discharge and receive passengers. (Rec., 867.) He further esti-

mated the cost of such ties at 9 cents per tie less than the evidence of Mr. Whittemore showed they in fact cost complainant. (Rec., 869, 870.) The witness further gave his opinion of the proper amount to be charged by complainant for carrying materials used in the construction of the line, and criticised the testimony of Mr. Whittemore that three-fourths of a cent per ton per mile was a proper charge, and insisted that it should be six-tenths of a cent per ton per mile, or a difference only of $240 per mile on the entire South Dakota lines. (Rec., 841.)

Mr. Whittemore testified (Rec., 424) that one year's interest should be charged upon the amount used to construct the road; Mr. Whitney considered that interest for six months was ample to cover that item in the cost of struction. (Rec., 842.)

Other witnesses criticised certain testimony given by witnesses on the part of complainant, but the amounts affected by such evidence are insignificant and the items comparatively immaterial.

If we should concede that the testimony of all the witnesses produced by defendant upon the subject of valuation of complainant's property in South Dakota be taken as true, the original cost of construction would be reduced not more than $900 per mile.

The value of a railroad property which is to be the basis of calculation as to the reasonableness of rates can only be determined by considering all the elements enumerated by Mr. Justice HARLAN in his opinion in *Smyth* v. *Ames*. It is not to be guessed at, but reached by giving to each of these elements, as Mr. Justice Harlan said, "such weight as may be just and right in each

case." The court below, after quoting from the opinion in *Smyth* v. *Ames*, proceeds to overrule it in the following extraordinary language:

"It is true that the record shows that the property is bonded and mortgaged for an amount largely in excess of this sum ($10,000,000), but the amount of a mortgage upon property is no evidence of its value, and, therefore, *is not worthy of consideration.*"

Mr. Justice Harlan, speaking for this court only a few months before, had said that it was worthy of consideration. The court below had even quoted Mr. Justice Harlan's language. The learned judge might with equal propriety have said that the original cost of construction is not worthy of consideration, or that the amount expended in permanent improvements, the probable earning capacity of the property under the rates prescribed, and the sum required to meet operating expenses were not worthy of consideration. Which of these various elements enumerated by Mr. Justice Harlan were considered by the court below is not disclosed, but it is certain the bonded indebtedness was not, for he repudiates it in explicit language.

No one would claim that the amount of bonded indebtedness upon railroad property can *alone* determine its value; for if it could a railroad company might increase the value of its property at pleasure by simply issuing bonds against it. But bonds which have been issued in good faith for value, and which are in the hands of *bona fide* holders and upon which interest must be paid in order to protect the property from seizure and sale, are to be considered and to be given such weight as may be just and right.

Exhibit 4, on page 11 of the record, discloses the list of

mortgages upon the South Dakota lines. It appears therefrom that bonds were issued upon such lines to the amount of $19,365,247.16, bearing different rates of interest, the average of which is 5.69 per cent. They are held by *bona fide* purchasers for value; the proceeds of them went into the property, and the mortgages by which they are secured are valid and subsisting liens upon it. It is the fixed and settled doctrine of this court that a railway company may lawfully charge such rates as will enable it to pay interest upon a valid and lawful indebtedness, provided it be not for a greater amount than the fair value of the property.

Reagan v. *Farmers' Loan & Trust Company*, 154 U. S., 362, was a suit brought by the trustee of a second mortgage to enjoin the enforcement of rates established by the Railroad Commission of the State of Texas. It was brought upon the specific ground that the rates established by the commission would prevent the International and Great Northern Railroad Company from earning sufficient moneys to enable it to pay the interest on its subsisting mortgages. The mortgage indebtedness, instead of being thought "not worthy of consideration," was the very foundation of the suit. It was decided that the bondholders had a right to their interest, and that the company had a right to establish such rates as would earn the money with which to pay it.

If the court below had been more moderate in its statement of the law, it would have said that the amount of bonded indebtedness upon a railroad is not *conclusive* evidence of its value, or that it could not alone be taken as a basis for estimating value. That is what Mr. Justice Harlan had declared in deciding *Smyth* v. *Ames*, *supra*, in the following language:

"And the apparent value of the property and franchises used by the corporation as represented by its stock, bonds and obligations, *is not alone to be considered* when determining the rates that may be reasonably charged."

Brushing aside the mortgage indebtedness because it was "not worthy of consideration," was simply disregarding the plain language of this court, which the court below was bound to take for its guidance.

The court below had before it not only the opinion of Mr. Justice Harlan in *Smyth* v. *Ames*, *supra*, but the opinion of Mr. Justice Brewer at the Circuit in the same case, *Ames* v. *Union Pacific Railroad Co.*, 64 Fed. Rep., 165. Instead of holding that the bonded indebtedness was not worthy of consideration, Mr. Justice Brewer said:

"It is not easy to always determine the value of railroad property, and if there is no other testimony in respect thereto, then the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or the other of these represents it, and computation as to the compensatory quality of rates *may be based upon such amounts.* In the cases before us, however, there is abundant testimony that the cost of reproducing these roads is less than the amount of the stock and bond account, or the cost of construction, and that the present value of the property is not accurately represented by either the stock and bonds or the original construction account. Nevertheless, the amount of money that has gone into the railroad property—the actual investment, as expressed, theoretically, at least, by the amount of stock and bonds —*is not to be ignored, even though such sum is far in excess of the present value.*" (p. 177.)

The above quoted language of Mr. Justice Brewer in the *Ames* case at the Circuit, exactly accords with what Mr. Justic Harlan said, in delivering the opinion of this

court, in the same case. Both of the learned justices recognized what the court below did not—that the value of railroad property cannot easily be determined, and that no intelligent witness can be expected to fix the present value of the property without considering the various elements which necessarily enter into it.

But notwithstanding the difficulty experienced by the court below in finding the value of the property in South Dakota from the evidence, it did find a value and entered it in its decree, namely, $10,000,000. The learned judge said it was a guess; but as will presently appear the guess must be made much lower in order to justify the conclusion which was reached

The court, by its decree, scales down the valuation of the property in South Dakota to $10,000,000, and *ipso facto* scales down the bonded indebtedness to that sum. If the value of the property is $10,000,000 and the valid outstanding bonded indebtedness is much more, it is certainly good to the extent of the $10,000,000. When we come to submit to the court the computations of the court below, as to the gross earnings and the relation they bear to the value of the property as found in the decree, and to the rates that may reasonably be charged, it will be seen that the bonded indebtedness is ignored altogether in the figures as well as in the opinion, and the interest charges thereon not taken into account at all. In other words, the court not only eliminates operating expenses from the case, but disposes of fixed charges in the same summary manner.

We take it to be settled beyond controversy that a railroad company is entitled to such rates as will enable it to earn (1) operating expenses, (2) the interest on its fair and valid bonded indebtedness, and (3) some reward for its stockholders.

After fixing the entire value of complainant's property in South Dakota at $10,000,000, the court held, and properly, that rates upon traffic wholly within the state could not be based upon the entire valuation of the property within the state because the property is used not only for local business but for inter-state business. The learned judge stated that no court had as yet promulgated any rule, how a just and true valuation should be reached, upon which to figure local earnings. The court then said:

"In the absence of any such rule, this court believes it is fair and just to first ascertain what per cent. of the total gross earnings in any one year the total local earnings are for that year, and having ascertained that per cent. to take the same per cent. of the total value of the property as a fair value upon which to fix local earnings."

We have no fault to find with this rule, although it was not a new one, for Mr. Justice BREWER had suggested it in *Ames* v. *Union Pacific R. R. Co.*, *supra*.

Let us now examine the computations made by the learned judge.

For convenience we tabulate the figures upon the business for the four years prior to the filing of the bill, as they appear in the opinion and in the decree. This table shows at a glance the gross results of operation during those years. It deals entirely with gross earnings and shows that upon the assumed valuation for local purposes, the local gross earnings were:

For the year ending June 30, 1894.....18.5%
" " " " " " 1895.....12.7%
" " " " " " 1896.....15.6%
" " " " " " 1897.....16.3%

Table showing computations of court below as to gross earnings and valuation of property before reductions are made.

	Year Ending June 30, 1894.	Year Ending June 30, 1895.	Year Ending June 30, 1896.	Year Ending June 30, 1897.
Complainant's gross earnings from all sources in South Dakota.....	$1,840,651.79	$1,236,680.78	$1,557,100.00	$1,605,210.66
Gross local earnings from freight and passengers..	407,606.35	330,642.85	328,105.95	311,005.42
Percentage of gross local freight and passenger earnings to gross earnings from all sources (in round numbers).	22%	26%	21%	19%
Valuation of property in South Dakota.	10,000,000,00	10,000,000.00	10,000,000.00	10,000,000.00
Valuation of property in South Dakota—basis of above per cent.—for local purposes.....	2,200,000.00	2,600,000,00	2,100,000.00	1,900,000.00
Percentage of gross local freight and passenger earnings, to valuation for local purposes in South Dakota....	18.5%	12.7%	15.6%	16.3%

After reaching the results which we have embodied in the last table, the court below applies the reductions made by the Board of Commissioners to the gross earnings Take, for example, the year ending June 30, 1894. For that year the gross local freight earnings were $137,459.88,
which being reduced 17 per cent. would leave $114,091.70
The gross local passenger earnings were
$270,146.07,
which being reduced 15 per cent. would leave $229,624.50

Total gross local freight and passenger earnings for 1894 after reductions..... $343.716.20

This reduction on the local business would, of course, also reduce the gross earnings from all sources for that year in an equal amount, or from $1,840,651.79 to $1,776,761.64. The local gross earnings as reduced amount to 19 per cent. of the gross earnings from all sources as reduced. The court then says:

"19 per cent. of $10,000,000 would be $1,900,000, and the local earnings as reduced would be 18 per cent. *of that amount.*" (See opinion, Rec., 979.)

Before applying the reductions made by the commissioners the court had found that in 1894 complainant earned on its capital invested in local business 18.5 per cent. After the reduction the court concludes that complainant can still earn 18 per cent. on the local valuation, *a difference of only one-half of one per cent.* Complainant has, therefore, suffered hardly an appreciable loss. The explanation of this astounding result is obvious. *The court figures the earnings before reduction on one amount of valuotion for local purposes, and after reduction upon another amount.* Before the reduction, when the local

earnings were 22 per cent. of the entire earnings in the state, the local capital was assumed to be $2,200,000, but when by operation of the commissioners' reduction the local earnings were reduced to 19 per cent., the court promptly reduced the amount of local capital to 19 per cent. of the entire value of the property, or $1,900,000. In other words, when the local earnings are reduced by the commissioners' schedule, the local capital is also reduced, so that complainant continues to earn practically the same percentage on its investment.

The court says substantially: "It is true, your earnings have been reduced, but your investment has also been reduced, so you are not materially harmed." According to the opinion, complainant had $2,200,000 invested in the property for local purposes in 1894. But the commissioners' schedule, if it had gone into effect then, reducing freight earnings 17 per cent. and passenger earnings 15 per cent., would have left to complainant about the same percentage of earnings that it had before the reduction, because the same act which reduced its earnings also reduced its investment. This means that complainant was compensated for its loss of earnings by a loss of capital.

The best way to show the fallacy of an argument is often to press it to its logical conclusion. The course of reasoning pursued by the court below leads to this result: That local rates may be reduced to the extent of diminishing the local gross earnings in any amount even to 99 per cent. and still show substantially the same percentage of gross earnings to the assumed value of the property. The subjoined table shows the result of reductions from 5 per cent. to 99 per cent. if the theory of the court below is correct.

THE METHOD OF COMPUTATION ADOPTED BY THE COURT BELOW, CARRIED OUT IN DETAIL, FOR THE YEAR 1894.

By exactly the same method adopted by the court below, a reduction in the gross local freight and passenger earnings in South Dakota—	Would reduce the gross local freight and passenger earnings from $407,606.35 to—	And would reduce the gross earnings from all sources in the State from $1,840,651.79 to—	The percentage of gross local freight and passenger earnings to the entire gross earnings would then be —	The investment properly applicable to local business would then be reduced from $2,200,000 to—	Upon which duced valuation reduced local earnings w amount to—
Of 5% or $ 20,380 32	$387,226 03	$1,820,271 47	21.3%	$2,130,000 00	18.18%
10% " 40,760 64	366,845 71	1,799,891 15	20.4%	2,040,000 00	18.00%
15% " 61,140 98	346,465 40	1,779,510 84	19.5%	1,950,000 00	17.77%
16% " 65,224 37	342,381 95	1,775,427 42	19.3%	1,930,000 00	17.74%
20% " 81,521 27	326,085 08	1,759,130 52	18.5%	1,850,000 00	17.62%
30% " 122,281 90	285,324 45	1,718,369 89	16.5%	1,650,000 00	17.23%
40% " 163,042 54	244,563 81	1,677,609 25	14.5%	1,450,000 00	16.86%
50% " 203,803 17	203,803 18	1,636,848 62	12.5%	1,250,000 00	16.34%
60% " 244,563 81	163,042 54	1,596,087 98	10.2%	1,020,000 00	16.00%
70% " 285,324 44	122,281 91	1,555,327 35	7.8%	780,000 00	15.67%
80% " 326,085 08	81,521 27	1,514,566 71	5.3%	530,000 00	15.30%
85% " 346,465 40	61,140 95	1,494,186 39	4.1%	410,000 00	15.00%
90% " 366,845 71	40,760 64	1,473,806 08	2.7%	270,000 00	14.70%
95% " 387,226 03	20,380 32	1,453,425 76	1.4%	140,000 00	14.55%
99% " 403,530 29	4,076 06	1,437,121 50	.28%	28,000 00	14.55%

This is a startling table; for it shows that under the theory followed in the decision below a reduction in the gross local earnings from 5 per cent. down to 99 per cent. makes a variance in the percentage of reduced earnings upon the assumed local investment, from 18.18 per cent. to 14.55 per cent., *or only 3.63 per cent.* The mathematics of the court is such, that if the commissioners had reduced the rates 100 per cent. so as to entirely wipe out the local earnings, no harm would have been done, because the local investment would also have been wiped out,—and we could not complain that we had earned nothing upon an investment of nothing.

The radical error in the computation of the court below (aside from the fatal one of leaving out operating expenses) is that the valuation for local purposes is changed while the computation is being made. The problem was to determine what change the reductions would make in the earning power of complainant, as it existed prior to the reduction. Whatever portion of complainant's investment may have been assigned to the conduct of local business, the effect of a reduction must be calculated upon *that* investment, and not upon another one which has resulted from the very reduction that is being examined. The court had found that complainant's investment properly applicable to local business for the year 1894 was $2,200,000; but when it came to determining the effect of the reduction, it figured that the valuation was $300,000 less, because by the very reduction which was under examination the local investment was to that extent reduced.

The table to which we have just asked the attention of the court is based upon the operations for the year ending June 30, 1894. If applied to the years 1895, 1896,

1897, or any other year, the result would be the same, the reduced valuation simply varying as the original valuation for the different years varied. The court below made its computations for each of the four years in question, and found that under the reduced rates complainant would have earned on the value of the property thus apportioned to local business,

18.0% for the year ending June 30, 1894,
12.1% " " " " 1895,
15.3% " " " " 1896,
16.2% " " " " 1897.

The court after giving the above percentages as the result of its careful computations, concludes its opinion as follows:

"It certainly would be impossible for this court to find, beyond a reasonable doubt, that these per cents allowed to be earned by the railroad company for local earnings would be depriving it of its property without due process of law, or depriving it of the equal protection of the laws."

It is hard to understand how any court, with *Smyth* v. *Ames* before it, could have been content to rest its decree upon a method of computation which from beginning to end treats gross earnings as net profits. In the first place the percentages themselves are wrong, for, as we have shown, they are based upon a wrong valuation; but even if they were correct, they do not speak the truth, because gross earnings do not and can not show the effect of any given rate.

The court concluded its computations just when it had reached the vital question, namely, what amount of these gross earnings, with which the court was dealing, *must be expended in the conduct of the business?* Over

and over again, in *Smyth* v. *Ames*, this court had emphasized this obvious requirement. The learned speaks of the percentages of gross earnings as "these per cents allowed to be earned by the railroad company for local earnings." Can it be necessary to point out that the amounts which a railroad company is "allowed" to earn under any schedule of rates, is the amount it has left after paying its operating expenses? If the court had not halted at the very threshold of the proper judicial inquiry, it would have found that under the schedule promulgated, complainant would not have been "allowed" to earn anything in the shape of reward. Reward is profit; but neither in the railroad business nor in any other is it the entire moneys which are received.

We have shown what it actually cost complainant to operate its system for the four years preceding the filing of the bill, which are the years used by the court below in making its computations. The operating expenses of the system were,

For the year ending June 30, 1894..... 64.21%
" " " " " " 1895.....62.35%
" " " " " " 1896.....60.21%
" " " " " " 1897.....60.94%

of the gross earnings. These figures and their effect upon gross earnings were before the court. It was also shown by an abundance of testimony, which was not disputed nor attempted to be disputed, that local operating expenses are and necessarily must be much higher than the operating expenses of the system. It was shown that the local operating expenses in South Dakota could not have been less than 85 per cent. of the gross earnings, and that they were undoubtedly much more. These estimates were not based upon naked expressions of

opinion, but were reached by a careful, methodical and intelligent analysis made by men of large experience and special knowledge of the subject.

If the court will now turn to table No. 1 on page 50 of this brief, it will be seen that the net local earnings after the reductions made by the commissioners' schedule, and allowing no more for operating expenses on local business than were incurred upon the entire system, would be,

For the year	ending	June 30,	1894.....	$80,657	94
"	"	"	" 1895.....	71,362	58
"	"	"	" 1896.....	78,055	20
"	"	"	" 1897.....	71,768	51

Out of these amounts, which are all that would have remained for the years named under the commissioners' schedule, complainant would have had to meet its fixed charges upon so much of its investment as was properly applicable to the local business. If the mortgage indebtedness upon the South Dakota lines be scaled down, in accordance with the valuation placed upon them by the court below, to $10,000,000, the proportion of that amount properly chargeable against the local investment would also be scaled down and would be,

For the year	ending	June 30,	1894.....	$2,200,000	00
"	"	"	" 1895.....	2,600,000	00
"	"	"	" 1896.....	2,100,000	00
"	"	"	" 1897.....	1,900,000	00

The bonds secured upon this property bore an average rate of interest of 5.69 per cent. This would make the interest charge on the local investment,

For the year	ending	June 30,	1894.....	$125,180	00
"	"	"	" 1895.....	147,940	00
"	"	"	" 1896.....	119,490	00
"	"	"	" 1897.....	108,110	00

and the company would have had only the amounts above shown as net earnings with which to pay this interest. Instead of having money with which to pay the 5.69 per cent. interest, it would have had only an amount sufficient to pay,

For the year ending June 30, 1894	3.67%
" " " " " " 1895	2.74%
" " " " " " 1896	3.72%
" " " " " " 1897	3.78%

The deficit in its interest account on the local investment would have been,

For the year ending June 30, 1894	$44,522 06
" " " " " " 1895	76,577 42
" " " " " " 1896	41,434 80
" " " " " " 1897	36,341 49

For the convenience of the court, we tabulate these figures so that they may be seen at a glance.

If operating expenses are no greater locally than upon system—

	Year ending June 30, 1894.	Year ending June 30, 1895.	Year ending June 30, 1896.	Year ending June 30, 1897.
Value of property used in local business as assigned, and amount of bonded indebtedness thereon	$2,200,000 00	$2,600,000 00	$2,100,000 00	$1,900,000 00
Average rate of interest on bonded indebtedness	5.69%	5.69%	5.69%	5.69%
Interest charge on property used locally	$125,180 00	$147,940 00	$119,490 00	$108,110 00
Net earnings as per table No. 1, page 50	80,657 94	71,362 58	78,055 20	71,768 51
Deficit in interest	$44,522 06	$76,577 42	$41,434 80	$36,341 49

In this table the original local valuation, the local gross earnings and the reductions in local gross earnings are all the identical figures found by the court; we simply insert the operating expenses that were actually incurred on the system, and then show what proportion of the interest charge the amount left would pay.

This brings us face to face with the question: Is a railroad company entitled to charge such rates as will earn not only its operating expenses but interest charges on an honest, valid and subsisting bonded indebtedness? If the court below was correct, the bonded indebtedness was neither to be considered on the question of value, nor upon any other question, for it was entirely ignored in every computation. But it has been established by this court—

First. That the valid bonded indebtedness must be considered on the question of value (*Smyth* v. *Ames*, *supra*), and

Secondly. That it must be considered in determining what compensation a railroad company is entitled to receive for service performed. (*Reagan* v. *Trust Company*, *supra.*)

The table last above given shows that allowing local operating expenses to be no greater than the operating expenses of the system as a whole, complainant would have earned under the commissioners' schedule less than half of its interest charge in one of the years, and but little more than half in the others.

We have computed the interest charge upon the original valuation fixed by the court, as properly applicable to the conduct of local business; but the court held that by virtue of the reduction under the commissioners' schedule,

the local valuation was reduced to the extent of $300,000 each year. We have pointed out the fallacy of this assumption, but even if the court below was correct in it, the result would still be that complainant could not earn sufficient to pay its interest charge. The valuation fixed by the court after the reduction, and as the result of the reduction, were

For 1894,	$1,900,000	upon which,	interest at	5.69%	would be	$108,110.00
" 1895.	2,300,000	"	"	"	"	"	130,870.00
" 1896,	1,800,000	"	"	"	"	"	102,420.00
" 1897,	1,600,000	"	"	"	"	"	91,040.00

The result is:

	Interest charge.	Net earnings.	Deficit in interest charge.
For the year 1894	108,110 00	$80,657 94	$27,452 06
" " 1895	130,870 00	71,362 58	59,507 42
" " 1896	102,420 00	78,055 20	24,364 80
" " 1897	91,040 00	71,768 51	19,271 49

This, then, is the conclusion the court below would have reached if it had not ended its computations before it reached a conclusion at all. If instead of stopping at gross earnings it had pursued its investigations to the end of the issue involved in the case, it would have found that upon its own showing complainant would not be "allowed" to earn its valid fixed charges, to say nothing of profit or reward.

The method pursued by the court below is, we venture to say, a novelty in judicial procedure.

First. With abundance of testimony showing the value of complainant's property in South Dakota to be more than nineteen millions of dollars—or if all the testimony for defendants were taken as true, more than

eighteen millions of dollars—the court of its own motion makes a guess that the value is ten millions of dollars, and embodies its guess in the decree.

Secondly. In computing the effect of the reduction upon the earning power of the property, the court reduces the local valuation *pari passu* with the reduction, and then finds the effect of the reduction, not upon the valuation with which it started, but upon a valuation resulting from the very reduction in question.

Thirdly. The computation ends with figures which do not pretend to show anything beyond the effect of the reduction upon gross earnings, and leaves the question of operating expenses and net earnings absolutely untouched.

Fourthly. It ignores the admittedly valid fixed charges.

The Increased Cost of Local Operations.

We have just shown the effect of the commissioners' reductions upon complainant's earnings if the local operating expenses in South Dakota were no more than the operating expenses of the system; but the fact which stands out most prominently in this record, is that local operations can only be carried on by incurring a largely increased expense. The system operating expenses include all the through business, and are affected by the economies which can always be introduced in the management of a large system. We have shown that if the court had allowed to the South Dakota lines even the same operating expenses as were incurred on the system, the result would have been an actual deficit in the interest charges, and no reward of any kind for the owners of the property. But if the court had considered, as we

submit it was bound to do, the increased cost of local operations, the errors into which it fell would have been still more striking. The testimony is perfectly clear and undisputed that local operations have not been and cannot be carried on in South Dakota for less than 85 per cent. under existing rates. If the court had taken that amount of money from the reduced gross earnings, upon which its computations were made, it would have plainly appeared that under the commissioners' schedule, the business could only have been conducted at a loss. There would have been nothing for the bondholders, nothing for the stockholders, and not enough gross earnings to pay the operating expenses, thus producing an actual deficit as the result of the local operations. That deficit would have been, as shown by table No. 2, page 51 of this brief,

For	the	year	ending	June	30,	1894.....	$4,083 42
"	"	"	"	"	"	1895.....	3,528 03
"	"	"	"	"	"	1896.....	3,282 28
"	"	"	"	"	"	1897.....	3,059 41

It is not necessary to pursue the inquiry further, by showing what would have been the loss if the local operating expenses were more than 85 per cent. for the years in question which the evidence clearly discloses they were. The computations made by the court below and embodied in the record constitute the best possible refutation of the conclusion which it reached.

No combination of figures can make it right, and no elaboration of opinion can make it legal, to determine the effect of a rate by considering only gross earnings. The learned judge stopped his computations when it would have been easy to go forward to the end; and if he had gone forward—as a determination

of the issues imperatively required—he would have seen, for it is perfectly apparent, that the action of the commissioners, if carried out, would deprive complainant of its property without due process of law, and deprive it of the equal protection of the laws.

GEORGE R. PECK,
A. B. KITTREDGE,
Solicitors for Complainant.